clear the Letterman show live, in part because the right to reject rule gives it a legal right to resist such pressure.

As the above example demonstrates, modifying the right to reject rule would grant tremendous leverage to networks over their affiliates. Many commenters also fear that it would subject the Commission to new, extraordinary administrative burdens whenever networks are not satisfied with the reason given by an affiliate for preemption. *See, e.g.*, Comments of SBA at 9 (arguing that the Notice's proposal "simply would enmesh networks and their affiliates in a Serb[ian] Bog of administrative litigation -- a result beneficial to no one"). Moreover, injecting the Commission into the determination of whether a preemption decision is financially motivated raises troubling constitutional concerns. *See* Comments of AFLAC at 8; Comments of Post-Newsweek Stations, Inc. ("PNS") at 4.

Finally, the comments established that so-called "economic preemptions" are of importance to local communities and must be protected. To illustrate the continuing need for the right to reject rule, the Joint Parties noted that if an NBC or CBS affiliate had preempted its network's programming to broadcast the 1939 World Series, an example cited by the Commission in the Chain Broadcasting Report, it would have made an economic preemption. Comments of Joint Parties at 20. The World Series is an entertainment event, not a public service program, and the decision to broadcast such a program today would probably be subject to great scrutiny under the proposed limitation of the right to reject rule. *Id.* at 5.

B. THE TIME OPTION RULE PRESERVES FAIR COMPETITION BETWEEN THE NETWORKS AND ALLOWS STATIONS TO CONTROL THEIR SCHEDULING AND PROGRAM DEVELOPMENT, INCREASING PROGRAM DIVERSITY.

ABC proposes that the time option rule be repealed or substantially cut back[23] in order to promote economic efficiency in the planning and development of network programming. Repeal or modification of the time option rule, however, would greatly disturb the scheduling and new program development of affiliate stations. As Pappas commented, repeal of the time option rule would force affiliates to operate totally at the scheduling whim of the network, depriving affiliates of their ability to plan local programming.[24]

Aside from disrupting affiliates' programming schedules, network abuse of time option provisions would harm new networks. ABC contends that option time practices would not be detrimental to new networks. The new networks themselves, however, disagree. Warner Brothers argues that the time option rule decreases available outlets for network programming. Warner Brothers is concerned that allowing networks to option time would foreclose opportunities for new networks to develop secondary affiliations. *See* Comments of Warner Brothers at 14. Warner Brothers contends that, in practice, the time option rule is particularly harsh because it prevents the newest network from gaining entry into the marketplace. *Id.* UPN and Viacom urged the Commission to continue the ban on time optioning by establishing networks, but they suggest that the time option rule be modified to allow limited time optioning by new networks.

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[23] ABC proposes that the Commission modify the time option rule to allow networks to option affiliate time, subject to a minimum notice period.

[24] As discussed earlier in the right to reject rule context, the networks have maneuvered around the rules to control the programming practices of their affiliates through virtual time optioning. *See, e.g.,* Comments of Joint Parties at 20, n. 33 ("existing network provision already approach (if they do not actually involve) time optioning").

The established networks argue that, in the interest of efficiency and free market principles, the Commission should totally repeal the time option rule. CBS contends that there is little reason to suspect that networks would impose oppressive contractual provisions on their affiliates. This premise is negated by the existence of current network provisions that already approach time optioning. *See* Comments of Joint Parties at 20, n. 33. The Joint Parties note that existing networks can exploit any ability to option time to preclude real competition from the new networks. *See id.* at 19.

For example, INTV notes that networks can prevent their stations from acquiring top quality replacement programs by optioning the time of their stations, without exercising the option. *See* Comments of INTV at 16-17. Several commenters noted that established networks can use option time practices to stymie the growth of new networks by locking up time slots on their affiliates that have secondary agreements with new networks. Time optioning may also be used to circumvent the exclusive affiliation rule, leading to anticompetitive behavior. *See id.*

Other commenters noted that programming by new networks would be hindered by time option practices because those networks would be less likely to develop programming for broadcast on stations that are affiliated with established networks for fear of being "bumped" in favor of programs submitted by the established networks. PNS notes that affiliates already clear a significant amount of broadcast time for network programs under the existing time option prohibition. *See* Comments of PNS at 5. As PNS correctly points out, repeal or modification of the time option rule would further decrease program diversity.

The honest view, and one that pervades the record, is that the Notice's proposal for a "notice period" could never be workable. NBC believes that the imposition of any notice period would be impractical because its programming decisions are often made on very short notice. Affiliate commenters concur with NBC's assessment of the impracticality of designating an advance notice period. INTV argues that any advance notice period would be inadequate because stations often purchase syndicating programming one or two years in advance of broadcasting. *See* Comments of INTV at 15. In its comments, SBA described the process by which affiliates obtain syndicated programming, explaining that a network would have to provide at least six months notice prior to abandoning its option for the affiliate to have an opportunity to choose quality alternate programming. *See* Comments of SBA at 13. SBA contends that the time option rule should be retained since no benefit accrues to the network of optioning time that far into the future, especially because networks typically make program decisions in shorter time frames, and affiliates may experience extraordinary difficulties in finding replacement programming. *Id.* at 13-14.

The Joint Parties assert that modifying the time option rule to require advance notice merely extends the period over which networks can control their affiliates. Comments of Joint Parties at iii. Warner Brothers argues that a notice period of any length would prevent secondary affiliation to the detriment of new networks. *See* Comments of Warner Brothers at 15. Viacom suggests a six-month notice period. Comments of Viacom at 12. It should be noted that the Commission has, in the past, tried allowing time optioning with an advanced notice period but it was unsuccessful. *See* Comments of INTV at 15.

C. THE EXCLUSIVE AFFILIATION RULE IN ITS PRESENT FORM IS CRITICAL TO THE SURVIVAL OF NEW NETWORKS AND IT ENABLES AFFILIATES TO BRING DIVERSE PROGRAMMING TO THEIR AUDIENCES.

The established networks advocate universal repeal of the exclusive affiliation rule, claiming that it inhibits competition. That contention is plainly wrong. As affiliate commenters establish, the exclusive affiliation rule promotes competition between networks. Elimination of the rule would restrict the available programming choices for stations, limiting their selection of programming that serves the public interest.[25] If the exclusive affiliation

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[25] *See* Comments of PNS at 7 ("By narrowing the sources of programming from which we can choose to provide a high-quality diverse format for our audiences, the proposal would contravene the public interest"); Comments of MAP at 7 ("repeal of [the exclusive affiliation rule] would diminish licensee ability to carry

rule were to be repealed, affiliates will be under increasing pressure to clear network programming or to develop very expensive (often prohibitively so) original programming.

ABC contends that repeal of the exclusive affiliation rule would aid efficiency by eliminating the "free riding" problem -- which occurs when established network-affiliated stations build an audience for a new network's competing programs. By its own contention, however, ABC indicates its desire to preclude secondary affiliations by the new networks, which will stifle competition.

NBC considers the exclusive affiliation rule to be a restriction on station, not network, choice. The stations, in their comments, are quite willing to retain that restriction on their choice. NBC argues that affiliate stations may be deprived of economic gains that they could have negotiated with their networks due to the prohibition on exclusive affiliations.[26] In line with its earlier "free market" advocacy, NBC argues that the marketplace should determine whether stations obtain primary or secondary affiliations. NBC asserts that marketplace negotiations between networks and affiliates are even handed and that agreements which curtail affiliate independence result from marketplace negotiation, not network dominance. As noted earlier, however, affiliates vehemently disagree with that assertion, noting that stations often acquiesce to station demands in order to maintain network affiliation. *See* note 7, *supra*.

ABC argues that the exclusive affiliation rule is unnecessary to protect opportunities for new networks, noting that there are sufficient outlets for new network programming, such as cable carriage and low power television stations. The new networks, however, argue strongly for the retention of the exclusive affiliation rule in its present form. Both new

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programming which serves the public interest and would thereby reduce program diversity").

[26] For example, ABC asserts that an exclusive affiliation between a network and its affiliate may be desirable for both parties because it allows them to differentiate themselves in an increasingly crowded marketplace.

networks noted the reluctance to use secondary affiliations, but they acknowledged that their survival depends heavily on their ability to establish such affiliations. *See* note 30, *infra.*

Warner Brothers characterizes secondary affiliation as "an essential building block" of its network. *See* Comments of Warner Brothers at 7. Warner Brothers has had difficulty in securing affiliates in both large and small markets and has affiliated with a low power station in a major market. Even though secondary affiliation is disfavored, Warner Brothers has 13 secondary affiliates. In its comments, Warner Brothers discusses examples of strong-arm tactics employed by Fox and UPN to achieve exclusivity with their affiliates at the expense of a new competitor. *See* Comments of Warner Brothers at 9-13.

UPN also attributes its viability to reliance on secondary affiliations in many markets. According to UPN, national advertisers will only market their products on stations that can provide at least 80% coverage of television households nationwide.[27] UPN has a coverage of only 72% of homes without secondary affiliations. With secondary affiliations, UPN has an additional 19% coverage for a total of 91% national coverage.[28]

As UPN notes, the crucial factor in assessing the value of secondary affiliation is not the size of the market alone, but the number of potential, adequate affiliates available in the market. NBC argues that the exclusive affiliation rule is unnecessary because most markets now have four or more commercial stations. However, only 21% of all local markets have the six stations necessary to support two new networks, and that coverage only amounts to 59% of television homes nationwide. Even in the few markets that have six or more commercial stations, those "extra" stations often have affiliations with religious, foreign language, or other unique program formats (such as home shopping networks), which make

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[27] *See also* Comments of Warner Brothers at 4, n. 7 (same).

[28] *See* Comments of UPN at 5-6. Similarly, Warner Brothers reaches 83% of the nation through its primary affiliates, secondary affiliates, and superstation WGN.

them unavailable for affiliation with UPN or Warner Brothers.[29] Both new networks acknowledge that secondary affiliation is critical to their existence.[30]

ABC notes that channel allotments which are currently unused may become activated as new sources of programming develop. ABC's argument is effective if secondary affiliations are allowed. As UPN notes, the entrance of new networks into the market through secondary affiliations will encourage the development of new stations which can later serve as primary affiliations, providing greater programming diversity for the local community. *See* Comments of UPN at 22.

The established networks claim that stations in small markets will have increased leverage to resist exclusive affiliations if they do not desire them. As the comments by two small market station owners indicate, however, stations in small markets are just as heavily dependant on network affiliations as those in large markets.[31] Small market stations appear to have very little bargaining leverage with their networks as evidenced by the struggles encountered by SBC's station WWSB and Great Trails' station WHAG to retain network affiliations.[32]

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[29] *See* Comments of UPN at 17 (noting that, aside from programming limitations, many "available" potential affiliate stations have geographic or technical handicaps or are satellite stations or translators).

[30] *See* Comments of UPN at 27 ("Without [the exclusive affiliation rule], UPN, as an emerging network, would be forced from the air"); Comments of Warner Brothers at 7 ("WB has had to enter into secondary affiliations to gain entry to the market").

[31] *See* Comments of Southern Broadcast Corporation of Sarasota ("SBC") at 7 ("The prospect of losing station WWSB's network affiliation was nothing less than catastrophic for SBC"); Comments of Great Trails Broadcasting Corp. ("Great Trails") at 2 ("without a network affiliation, WHAG-TV's continued viability would be extremely problematic").

[32] Arguably, lack of bargaining power with major networks has prompted both SBC and Great Trails to file comments arguing forcefully for the retention of the network territorial exclusivity rule. These stations do not agree that they have the "clout" to ensure that they will not have their affiliations terminated. In fact, SBC and Great Trails contend that large market stations have more bargaining power than they do in negotiations with the networks.

CONCLUSION

The established networks advocate that the Commission radically alter the network-affiliate relationship by gutting existing safeguards that have preserved station autonomy for nearly fifty years. The established networks seek to prevent real competition in the delivery of free, universal over-the-air broadcast programming which would lead to decreased viewer choice and the demise of the already fragile emerging networks.[33] On the other hand, NASA and other affiliate groups have set forth a reasonable and rational position regarding the network-affiliate rules that proposes lifting unnecessary restrictions while maintaining essential protections which foster competition among networks, promote diversity in programming, and enable affiliates to conscientiously serve their local communities. NASA's views are supported by hard economic evidence, in contrast to the empty and unsupported rhetoric of the networks.

It is the licensee, not the network, that is required by law to serve the public interest.[34] The Commission is charged with the duty of ensuring that licensees fulfill their public obligations. Retention of the three core network-affiliate rules -- the right to reject,

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[33] As UPN candidly admits, the exclusive affiliation rule and the time option rule are conditions precedent to its existence. *See* Comments of UPN at 35. Warner Brothers similarly asserts that "[i]f the Commission eliminates [the network-affiliate] rules at this fragile juncture in The WB's development, The WB might very well not survive." Comments of Warner Brothers at ii.

[34] As one affiliate commentator noted, the recent movement toward network and movie industry conglomeration mandates that the Commission vigilantly protect affiliate independence and preserve the ability of affiliates to serve the public interest at the local level. *See* Comments of Pappas at 2.

time option, and exclusive affiliation rules -- in their present form is a major step in discharging that duty.

Respectfully submitted,

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Exhibit A

SUMMARY OF COMMENTS ADDRESSING THE COMMISSION'S PROPOSAL TO AMEND THE NETWORK-AFFILIATE RULES

Introduction. The overwhelming majority of comments either explicitly endorsed, strongly favored, or directly supported NASA's position. The affiliate group owners and affiliate supporters generally endorsed the NASA comment, although some commentators reiterated the importance of a particular rule or stated their own reasons for supporting or opposing a given rule. The new networks[1] -- WB and UPN -- argued quite strongly for the retention of the exclusive affiliate rule and some form of the time option rule.[2] WB also supports the proposed modifications to the right to reject and network territorial rules. The established networks -- ABC, CBS, and NBC -- of course, argued vigorously for the near-total dismantling of the rules.

This memorandum first discusses the general trends in the arguments made by the commentators. The memorandum then summarizes the individual positions taken by each party, outlining the views of the affiliate groups and their supporters, new network entities, and the established networks, respectively. Finally, the memorandum concludes with a broad overview of the tenor of the comments.

I. General Trends Among the Comments

One individual and well over twenty entities representing broadcasting companies, other than NASA, commented on the Commission's proposed revision of the network-affiliate rules. The affiliate groups, on the whole, supported the retention of the core network-affiliate rules -- the right to reject rule, time option rule, and exclusive affiliation rule -- in their present form. For the most part, established networks called for the repeal of those rules. Generally, WB and UPN tended to support the positions taken by the affiliates except with regard to the right to reject rule and, in one case, the time option rule.

The commentators had radically different visions of the degree of bargaining power that the established networks possess in relation to their affiliates. Everyone acknowledges that tremendous technological advances have increased the number and types of players in the video marketplace. That is, however, where the similarity ends. Affiliates

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[1] In this memorandum, the term "new networks" or "emerging networks" describes the most recent entrants in the network arena, namely the United Paramount Network ("UPN") and the Warner Brother's Network ("WB"). The term "established networks" refers to ABC, CBS, and NBC, which have historically been the big three networks. Generally, the criticisms that affiliates have addressed to those networks apply equally to the Fox Network which has established itself as a strong competitor of the three established networks.

[2] UPN recommended that the time option rule be modified to allow new networks the ability to option time while prohibiting established networks from engaging in the same practices.

overwhelmingly believe that the established networks have gained increasing leverage in their relationships with their affiliates in recent years -- due, in part, to the deregulation efforts of the Commission. The established networks paint a dramatically different picture, arguing that affiliates have become more powerful as evidenced by recent affiliate realignments and increased compensation. The new networks contend that the established networks continue to dominate affiliates, often imposing anti-competitive provisions in affiliation agreements that hinder the ability of new networks to succeed.

Arguments against the Notice's proposal to clarify the right to reject rule to prevent affiliate preemptions of network programming based solely on economic factors, ranged from the desire of affiliates to retain unfettered control over programming to concerns that such a modification would pose challenging administrative and constitutional hurdles. Networks, on the other hand, argued that the right to reject rule should be severely limited in order to: (1) allow for "free-market" negotiations between networks and their affiliates regarding preemption, (2) boost network revenue in order to sustain expensive program development, and (3) serve the public interest. Several commentators found no need to clarify the right to reject rule, noting that many affiliation agreements already limit financially based preemptions.

Supporters of the current version of the time option rule, including most affiliate and new network commentators, argue that it is necessary to: (1) ensure that stations maintain control over their scheduling, (2) foster the development of new networks by increasing available outlets for their programs, and (3) promote diversity in programming. Detractors of the rule, consisting mainly of the established networks, argue that it is unnecessary and causes economic inefficiency in the planning and development of network programming. The established networks also argue that there are sufficient alternative outlets for programming developed by the new networks. Most affiliates and established networks believe that the Notice's proposal to craft a notice period by which networks would alert affiliates of their intention to exercise their time option was unworkable. Of the new networks, WB supports the time option rule in its present form, while UPN and Viacom (which maintains a large interest in UPN) propose allowing only new networks to option time.

Affiliates argue that the current rule banning exclusive affiliations is, like the right to reject rule, crucial to the ability of stations to fulfill their obligation to select programming that serves the public interest. They warn that exclusive affiliations hurt new networks and may prompt some stations to broadcast network programming as a matter of course by eliminating alternative programming sources.

The established networks contend that the decision to enter into an exclusive relationship should be left to marketplace negotiations between networks and affiliates. They contend that exclusive affiliations increase efficiency and prevent new networks from obtaining a "free ride" on the programming and good reputation of an established network. The established networks further note that new networks have alternative outlets, such as cable, available for their programming. Conversely, the new networks strenuously oppose lifting the ban on exclusive affiliations, noting that secondary affiliations are critical to their very existence. In their comments, the new networks discuss practices currently employed by the established networks to prevent the development and growth of new networks.

Several commentators had strong views on either the dual network rule or the network territorial exclusivity rule, but most favored some modification of both rules. The established networks strongly advocated the immediate repeal of the dual network rule, arguing that it is anticompetitive, decreases diversity for viewers and stations, and is unnecessary as a safeguard against increased network power. For the most part, affiliates acknowledged that the dual network rule needs to be modified, but they urge the Commission to defer revision or repeal of the rule pending further investigation or, in the view of one commentator, elimination of the duopoly rule, so as to avoid increasing network market power at the expense of affiliates. Most commentators supported the Notice's proposal to modify the network territorial exclusivity rule, although one commentator, the Southern Broadcast Corporation of Sarasota, Florida, argued that the rule should be reinforced in order to protect stations in small communities.

Finally, although most of the commentators generally support the Commission's continual review of the necessity of these rules, several commentators decried the Commission's "piecemeal" approach to reviewing the rules. In the view of some of the affiliates, such an approach diminishes an accurate view of the cumulative effect of the deregulation, which is increased network power. The established networks argue that the cumulative effects of these rules will be increased efficiency without either party having an unfair advantage in the bargaining relationship.

II. Positions Taken by Individual Commentators

In the discussion that follows, the positions of the individual commentators are summarized. Where appropriate, the summaries are divided by subheadings.

A. Affiliate Group Owners or Supporters

1. The Association of Independent Television Stations, Inc. ("INTV")

INTV is an association of television stations that are primarily affiliated with the newer networks -- Fox, UPN and WB. INTV submitted a comment to address the concerns of affiliates who are associated with the emerging networks. The two themes stressed by INTV in its comment are: (1) that stations must retain local programming decision-making ability in order to serve the interests of their local communities; and (2) that local television stations must be able to make economic decisions at the local level in order to compete with the growth of alternative video distribution systems.

INTV urges the Commission to retain the core network-affiliate rules -- the right to reject rule, the time option rule, and the exclusive affiliation rule -- in their present form. INTV contends that the proposal to modify the right to reject rule to prohibit station preemptions solely for financial reasons undermines the rule and is unworkable. INTV advocates the retention of time option prohibitions, noting that time option practices prevent secondary affiliations, which are essential to new networks. Additionally, INTV notes that stations require more than one year's notice in today's marketplace to find replacement programs if a network declines to exercise its option. INTV notes that repeal of the exclusive affiliation rule could prevent the development of new networks and would narrow local programming choices.

a. Changes in the Video Marketplace

INTV argues that the enormous changes that have taken place in the television industry have not altered the relationships between the established networks and their affiliates. In INTV's view, there has been no diminution of network power over local affiliated television stations. Instead, networks have grown in their production capabilities and have aligned themselves with studio conglomerates which enable them to take greater advantage of additional outlets for their increased "in-house" production capability and which allow them to reach larger audiences through the addition of cable channels. Consequently, networks have an increased financial interest in clearing their programming through local affiliate stations. INTV argues that network pressure on affiliates to clear programming will increase in the future.

In its comment, INTV discusses the suggestion in the Notice that networks have reduced leverage in their relationships with their affiliates as evidenced by recent affiliate shifts. INTV asserts that these affiliate shifts were the result of the Fox Network's desire to obtain more desirable VHF stations. Therefore, INTV contends, the affiliate shifts do not represent an increased degree of power among the affiliates, but rather a reshuffling of affiliates provoked by the decision of one network to realign its affiliations. INTV acknowledges that the stations were able to secure greater network compensation as a result of these new affiliate shifts, but adds that the costs of the increase in compensation has been that the networks have locked affiliates into long-term affiliation agreements that contain more onerous contract provisions.

INTV notes that several regulatory and economic changes have added to network leverage over affiliates in past several years. For example, INTV identifies the elimination of the financial interest and syndication rules as precipitating the recent mergers between program producers and networks. With the growth of "in house" program production by networks, the affiliates will face increasing pressure to clear programs because the networks will have an increased financial stake in the programs that they distribute. INTV also points to the elimination of the prime time access rule as an example of how the networks have gained an additional hour of television time that they can demand that their affiliates clear.

Contrary to the proposal in the Notice, INTV suggests that the development of wireline and satellite delivered services provides an additional justification for retaining these network-affiliate rules. As the networks increasingly have alternative outlets for their programming, they will be more willing to bypass their affiliates in distributing their programs. Local television stations will consequently have a reduced bargaining position vis-a-vis their networks. INTV asserts that all of these changes, economic and regulatory, should be considered when evaluating the network-affiliate rules. Additionally, INTV argues that the rules themselves should be considered as a package.

b. The Right to Reject Rule

INTV views the right to reject rule as "the cornerstone of the American broadcasting system". See Comment of INTV at 10. INTV argues that requiring a local station to submit to a financial test of its programming decisions is both unworkable and contravenes the Commission's historical policy of protecting local control of programming decisions. Forcing affiliate stations to bear the burden of proving that their preemption of a network program was not solely based on financial considerations is, in the view of INTV, the antithesis of local editorial discretion. INTV argues that apart from a station's ability to prove that a given programming decision was not financially motivated, the Notice's proposal will chill editorial discretion.

INTV further notes that the proposal will be unworkable and is unnecessary given that local affiliated stations presently clear about 98% of all network prime time programs. INTV notes that whenever a station rejects network programming, the Commission would become embroiled in the process of determining whether that station had valid reasons for rejecting its network's programming.

c. The Time Option Rule

INTV asserts that elimination of the time option rule represents a loss of editorial discretion at the local level. INTV notes that any advance notification period, as suggested by the Notice, would be inadequate because stations often have to purchase syndicated programming a year or two in advance of broadcasting. When networks have the ability to option the time of their stations and do not exercise that option, stations are precluded from acquiring top quality replacement programs. INTV asserts that the established networks would be able to use time option practices to stymie the growth of the emerging networks by locking up time slots on their affiliates that have secondary affiliation agreements with the new networks.

INTV asserts that time option practices may be used to circumvent the exclusive affiliation rule and can therefore lead to anticompetitive practices on the behalf of the established networks. Additionally, INTV indicates that the Commission once tried allowing time optioning with an advance notification period, but it was unsuccessful.

d. The Exclusive Affiliation Rule

INTV further contends that retention of the present exclusive affiliation rule is critical to the growth of the emerging networks. Those networks rely heavily upon secondary affiliations for survival. INTV argues that the rule fosters competition among the networks and that the competitive benefits of the rule are equally important in both large and small markets.

e. Other Network-Affiliate Rules

INTV suggests that the Commission carefully consider the proposed changes to the network territorial exclusivity rule and the dual network rule. INTV recommends that the network territorial exclusivity rule be modified such that the geographic zone would be defined as a local stations designated market area ("DMA"). In addition, INTV recommends that the dual network rule remain in place at this time, but suggests that the Commission revisit this issue when the Commission considers the regulation of advanced digital television.

2. Chief Counsel for Advocacy of the United States Small Business Administration (the "SBA")

SBA urges the Commission to retain the three core network-affiliate rules to prevent further network domination of their relationships with affiliates. In their comment, SBA reviews the history behind the rules and commends the Commission for its review of the rules when technological and market condition warrant such reevaluation. However, they note, the Commission's current effort seems geared toward simply deregulating the networks rather than seeking to protect the public interest, local broadcasting, and program diversity.

a. The Right to Reject Rule

With respect to the right to reject rule, SBA points out that a program with greater local interest may also produce higher ratings, thereby raising network suspicions about whether the decision to air the program was publicly minded or financially motivated. Forcing affiliates, which are mostly owned by small businesses, to prove that their decisions are in the public interest imposes a great burden on them. SBA indicates that the Commission failed to cite any serious problem concerning rejection of network programming for financial reasons, noting that affiliates have significantly increased their clearances of network programming in the past fifteen years despite the increased availability of alternative programming.

b. The Time Option Rule

SBA disputes both the notion that new networks need to option time and the corresponding prediction that without such an option, those networks will not be able to provide original and innovative programming. SBA notes that affiliates afford network programming a high -- 98% -- clearance rate, even with the time option rule.

SBA explained in detail the process by which stations obtain alternative programming. It is clear from their explanation that any designation of a notice period by which networks would have to alert affiliates that they intend to option broadcast time would have to be quite lengthy and, thus, impracticable for both networks and affiliates.

c. The Exclusive Affiliation Rule

SBA argues that the exclusive affiliation rule should be retained in both large and small markets. They note that repeal of the exclusive affiliation rule, like repeal of the right to reject rule, would allow networks to dictate the programming of their affiliates.

d. Other Network-Affiliate Rules

SBA agrees that some modification of the network territorial exclusivity and dual network rules may be appropriate after further investigation.

3. Media Access Project ("MAP")

The Media Access Project argues strenuously against the Commission's proposals to revise most of the network-affiliate rules. In MAP's view, "the Commission seems willing to incur a significant cost to the public interest in exchange for illusory benefits." Comments of Media Access Project at 1. MAP argues that the proposal would seriously undermine program diversity and limit station autonomy thereby hindering licensees from fulfilling their public interest obligations. According to MAP, arguments in favor of the Commission's proposals forsake the goals that have been at the heart of the Commission's regulation of the broadcast industry -- that is, fulfillment of the public interest by station licensees.

MAP cautions against underestimation of the "formidable" leverage that networks have over their affiliates. For example, MAP points to the Notice's exaggeration of the presumed effect of group ownership on bolstering the bargaining position of affiliate stations. MAP contends that the Commission's statistics on group ownership are overstated because they include group owners that own three or fewer licenses -- which does not provide such owners tremendous bargaining power. Moreover, as MAP points out, the Commission presents no concrete examples where group ownership significantly altered an affiliate's bargaining position.

a. The Right to Reject Rule

MAP argues that the Commission's proposal to modify the right to reject rule would significantly curtail licensee discretion in the interest of protecting network profit margins. MAP reminds the Commission that licensees, not networks, are the entities that are charged with serving the public interest.

In MAP's view, a station must be able to reject network programming, even for financial reasons, in order to serve the public interest. For example, financially motivated rejections may result in added revenues which a station may use to support its news and public affairs programming. MAP notes that the Commission makes the same argument with respect to the importance of safeguarding network revenues, but MAP contends that it is even more important to protect local station revenues -- as stations are the parties obligated to create programs that serve their communities. Additionally, MAP points out that network revenues are higher than ever before even without any restriction on the right to reject rule. The incidence of affiliate preemption of network programming is small, which further indicates that the cost to network revenue attributable to the right to reject rule is low. MAP asserts that as networks continue to merge and concentrate their resources and power, the Commission need not concern itself with protecting them.

MAP argues that if the Commission accepts the financially based limitation on the right to reject rule, it should require that the networks, not the stations, shoulder the burden of proof. If the Commission requires that affiliates justify their rejections of network programming, networks will be able to harass their affiliates, resulting in a chilling effect on preemptions which would be tantamount to total repeal of the rule. MAP argues that, at the very least, if the Commission adopts the proposed limitation on the right to reject rule, the limitation should be applied only to stations in the largest markets.

b. The Time Option Rule

MAP advocates a retention of the time option rule in its present form for the four major networks, but suggests that the Commission make an exception to the rule, permitting time optioning, for new networks such as WB and UPN. MAP argues that the Commission should, at the very least, provide for a notice period in the event that it decides to repeal the time option rule. MAP defers to other commentators to determine the appropriate length of the notice period.

c. The Exclusive Affiliation Rule

MAP perceives no reason to repeal the exclusive affiliation rule because the rule is unobtrusive with few economic costs. In MAP's opinion, repeal of the exclusive affiliation rule would hinder licensee autonomy because networks would be able to dictate affiliate schedules during non-network time by precluding the affiliate from airing shows from other networks. Accordingly, repeal of the exclusive affiliation rule would diminish the ability of licensees to present diverse programming that serves the public interest. Furthermore, repeal of the rule would seriously undermine the Commission's competition goals by reducing the ability of new networks to find outlets for their programming.

d. The Dual Network Rule

MAP does not oppose the proposed repeal of the dual network rule, but argues that the Commission should not allow such a repeal to enable networks to avoid existing restrictions placed on traditional networks, such as the multiple ownership rules.

e. The Network Territorial Exclusivity Rule

MAP supports the retention of the network territorial exclusivity rule and emphasizes its importance in promoting diversity and competition.

4. The Joint Commentators

Chronicle Broadcasting Company, LIN Television Corporation, Midwest Television, Inc., The Providence Journal Company, and Spartan Communications, Inc. (the "Joint Commentators") submitted a comment expressing their opposition to the Commission's proposed modification of the right to reject, time option, and exclusive affiliation rules. The Joint Commentators are licensees of more than two dozen network-affiliated television stations nationwide. The Joint Commentators contend that without freedom of choice in obtaining programming, unconstrained capacity to reject programs, and exclusive control over program scheduling, affiliates would be hampered in their ability to satisfy their obligation to program in the public interest.

a. Right to Reject Rule

The Joint Commentators assert that the key tool by which licensees ensure that they broadcast only those programs which they find suitable for the needs of their local audiences, is the unrestricted right to reject network programming. Stations must not be forced to justify their decisions to reject network programming to satisfy networks and the Commission that each rejection decision was not solely based on economic concerns. Such a requirement would grant a tremendous degree of leverage to networks over affiliates and would subject the Commission to new administrative burdens.

b. The Time Option Rule

The Joint Commentators contend that time option practices disrupt the ability of stations to build audiences for local programming and advertising. They note that new networks may be discouraged from producing new programs or distributing those programs on stations affiliated with established networks knowing that their programs may be "bumped" in favor of those submitted by the established networks.

c. The Exclusive Affiliation Rule

The exclusive affiliation rule, in the view of the Joint Commentators, is necessary to ensure that stations have diverse sources of programming to offer their audiences. The rule safeguards affiliate freedom of choice in programming and enables major-network-affiliated stations to broadcast programs from new networks when circumstances permit.

5. Post-Newsweek Stations, Inc. ("PNS")

PNS owns and operates six VHF stations affiliated with the three major networks in Detroit, Michigan; Hartford, Connecticut; Jacksonville, Florida; Miami, Florida; Houston, Texas; and San Antonio, Texas. PNS fully supports NASA's comment, but filed an additional comment to reemphasize the negative impact that the Notice's proposal to modify the right to reject rule, the time option rule, and the exclusive affiliation rule would have on the network-affiliate relationship. PNS agrees with NASA's assessment that, contrary to the assertions in the Notice, the power of networks has grown in recent years.

a. The Right to Reject Rule

PNS argues that public interest requires that licensees retain control over the selection of their programming. Requiring affiliates to defend their decisions to reject network programming would be administratively distracting to both the Commission and stations and would encourage some affiliates to broadcast network material as a matter of course. Additionally, PNS asserts, some preemptions result from the desire to broadcast other programming which is more highly demanded by a station's community, and, consequently, is more profitable. Forcing affiliates to justify these decisions as "nonfinancial" is burdensome and threatens to inject the Commission into the programming process -- raising constitutional concerns.

b. The Time Option Rule

PNS contends that time option practices hinders its ability to cultivate audiences and advertisers for local programs, limits its acceptance of new network programming, and creates uncertainty in the scheduling of programming. PNS argues that merely lengthening the time by which networks must notify affiliates of their intention to use their option time is no solution. In the view of PNS, affiliates already clear a significant amount of broadcast time for network programs and modification of the time option rule will further decrease programming diversity.

c. The Exclusive Affiliation Rule

PNS notes that the exclusive affiliation rule allows established network affiliates to bring new network programming to their viewers. Elimination of the exclusive affiliation rule would narrow the available programming choices for stations, frustrating their selection of programming that serves the public interest. In the absence of the exclusive affiliation rule, the corresponding elimination of new network programming and the often-prohibitive expense of developing original programming may result in the near-total clearance of network programs by some stations.

6. New World Television, Inc. ("New World")

Although acknowledging that the network-affiliate rules at issue in the Notice are ripe for review, New World argues that the rules have helped preserve local control over station programming decisions. New World believes that the Notice overstates the effect of recent changes in the video marketplace on the network-affiliate relationship, noting that the basic tension between those two entities remains unchanged today. New World cautions that local programming will be replaced by network programming in the most-watched time period if the bargaining power between networks and affiliates is tipped in favor of the networks.

a. The Dual Network Rule

New World is most concerned about the dual network rule -- urging the Commission to simultaneously eliminate the duopoly rule, if the dual network rule is repealed, to prevent affiliates from being competitively disadvantaged. New World also suggests that the Commission consider whether national ownership caps should be lifted if the dual network rule is repealed. New World cautions against the elimination of both the time option rule and the dual network rule until local and national ownership rules are relaxed.

b. The Right to Reject Rule

New World does not perceive the need for clarification of the right to reject rule unless a dispute over rejection for financial considerations arises.

c. The Network Territorial Exclusivity Rule

Finally, New World supports the Commission's proposal to eliminate the first part of the network territorial exclusivity rule.

7. AFLAC Broadcast Group, Inc. ("AFLAC")

AFLAC owns and controls major network-affiliated stations in Baton Rouge, Louisiana; Columbus, Georgia; Savannah, Georgia; Huntsville, Alabama; Washington, North Carolina; Cape Girardeau, Missouri; and Waterloo, Iowa. AFLAC asserts that the proposed regulatory changes should not be considered in a vacuum, but rather, they should be evaluated in the context of other contemplated changes that will have the cumulative effect of concentrating control over local programming in the hands of the networks. AFLAC argues that the Commission should not consider modifications of the network-affiliate rules until the effects of other statutory and regulatory changes can be assessed, particularly in light of the current trend toward concentration of power in a few vertically integrated networks.

a. The Right to Reject Rule

AFLAC contends that the proposal to modify the right to reject rule is premature and unwise. The proposal would be extremely difficult and costly to administer and would greatly impair the ability of stations to make independent programming decisions.

AFLAC also asserts that the proposed modification of the right to reject rule is unclear. For example, AFLAC has a CBS-affiliated station that regularly delays the David Letterman show for one-half hour in order to broadcast a local high school sports program on Friday nights. Although the sports program is more profitable to the affiliate than David Letterman, it serves an important public benefit as demonstrated by its commendation from the community and great popularity with local high school students. CBS has greatly pressured the station to clear the time for the Letterman show to be broadcast live, but the station has resisted such efforts, partly through its exercise of its right to reject network programming. AFLAC correctly surmises that their station's programming decision to delay Letterman in favor of the sports program would come under attack if the Notice's proposal is adopted. In its comment, CBS directly challenged the retention of an affiliate's right to reject network programming in order to broadcast local sporting or entertainment events. See Comment of CBS at 19.

AFLAC notes that the proposed modification of the right to reject rule would be inconsistent with the Communications Act and would significantly reduce affiliate rejection of network programming for whatever reason. Consequently, there would be fewer public interest preemptions and affiliates would be inhibited in exercising their duty to serve their local communities. Additionally, the proposed rule would expend limited Commission time and resources in reviewing station programming decisions -- an activity which raises serious First Amendment issues.

8. Pappas Stations Partnership ("Pappas")

Pappas Stations Partnership holds licenses to operate several television stations in California, Nebraska, and Nevada. Pappas generally agrees with the points raised in the NASA comment, but additionally argues in favor of the network territorial rule and the dual network rule.

Pappas is concerned that the piecemeal approach that the Commission has taken in reviewing the regulations concerning networks and affiliates masks the totality of their impact. Pappas points out that the network-affiliate rules have been very effective in past years and that the recent movement toward network and movie industry conglomeration mandates increased Commission vigilance to protect affiliate independence and to preserve the ability of affiliates to serve the public at the local level.

Pappas cautions that the right to reject rule should be shielded from "second guessing" and "tampering" by the networks. Pappas is concerned that affiliates will become "totally subject to the scheduling whims of the network" and will lose control over their ability to plan local programming if the time option rule is repealed. Additionally, Pappas questions the need to examine the exclusive affiliation rule.

Pappas contends that the network territorial exclusivity rule has worked well to allow "fringe" stations to enter and succeed in the market, providing a much needed outlet for local news and community programming. Pappas agrees that the rule may be modified to allow networks to operate a second network in the same marketplace, but proposes that the primary affiliate of that network have the first choice to affiliate with the new network, under the same terms provided in the primary network affiliation agreement.

Pappas suggests that the Commission look more closely at the current network-affiliate agreements. In doing so, the Commission may find that strengthening, not weakening, of these rules is in order.

9. Lee Enterprises, Inc. ("Lee")

Lee is the licensee or controlling owner of nine television stations and seven television satellite stations. Lee fully supports the NASA position, but comments separately to express its particular concern with the Commission's proposal to modify the right to reject rule.

a. The Right to Reject Rule

According to Lee, a decision by the Commission to "clarify" the right to reject rule to prevent affiliates from preempting network programming based on financial concerns would place broadcasters in the position of justifying their programming decisions, create administrative confusion, and undermine the public interest rationale behind the rule. In Lee's view, the marketplace has not evolved to the point where affiliates have gained leverage and bargaining power sufficient to guard against network control over programming decisions. Lee candidly notes that "the value of a network affiliation is substantial -- therefore, in the absence of safeguards, licensees would be more likely to compromise local, independent programming judgments than risk loss of their affiliation." See Comment of Lee Enterprises, Inc. at 4.

10. The New York Times Company ("The Times")

The Times owns and operates ABC and CBS affiliated stations in Memphis, Tennessee; Huntsville, Alabama; Norfolk, Virginia; Scranton, Pennsylvania; Fort Smith, Arkansas; and Moline, Illinois. The Times makes explicit its direct support and endorsement of NASA's comment.

The Times notes that, absent the right to reject and option time rules, networks will increasingly require that affiliates broadcast only network programs during the majority of the programming day. The Times, however, acknowledges that modification of the network territorial exclusivity rule is now warranted.

11. Southern Broadcast Corporation of Sarasota ("SBC")

SBC is the licensee of WWSB, an ABC-affiliate serving Sarasota, Florida. SBC is quite concerned about the fate of small community network affiliates if the network territorial exclusivity rule is modified. SBC perceives no need to modify the other network-affiliate rules, but also does not appear to oppose their modification. SBC's comments are important as the NASA comment urged the Commission to duly consider the views of smaller stations that may bring particular circumstances to the Commission's attention regarding the network territorial exclusivity rule. SBC submitted an abundance of material as exhibits to its comment.

a. The Network Territorial Exclusivity Rule

SBC urges the Commission to maintain and strengthen the network territorial exclusivity rule by: (1) applying the rule to networks as well as affiliates; (2) delineating specific fact scenarios as prima facie evidence of a rule violation; and (3) providing prompt opportunities for discovery to those parties trying to establish a prima facie case of rule violation.

SBC is disturbed by the practice, between by major networks and group station owners, of tying affiliations in smaller communities with those in larger communities, resulting in the termination of free over-the-air local television broadcasts for residents of smaller communities.

For example, SBC's Sarasota station was almost terminated by ABC because the network had negotiated a deal with a group owner for affiliations in Detroit and Cleveland. A local Tampa, Florida station was a part of the deal and because that station's signal overlapped with SBC's Sarasota station's signal, ABC intended to disaffiliate with SBC's station. Fortunately, after filing a petition with the Commission arguing that their disaffiliation would violate the network territorial exclusivity rule, SBC's Sarasota station was able to negotiate a settlement with ABC and remained an affiliate. Other stations have not been as fortunate. Consequently, SBC contends that the current network territorial exclusivity rule needs to be strengthened in order to protect stations serving small communities.

12. Sinclair Broadcast Group, Inc. ("Sinclair")

Sinclair Broadcast Group, Inc. owns seven UHF televisions stations in Pittsburgh, Pennsylvania; Baltimore, Maryland; Raleigh, North Carolina; Columbus, Ohio; Norfolk, Virginia; Birmingham, Alabama; and Milwaukee, Wisconsin. Six of the stations are Fox affiliates and the Milwaukee station is affiliated with UPN.

Sinclair urges the Commission to retain the right to reject, time option, and exclusive affiliation rules, which it dubs the core regulations that enable licensees to select the programming that is most responsive to their community's needs. Additionally, Sinclair supports retention of the dual network rule to prevent further erosion of local television bargaining power in relation to affiliated networks. Sinclair takes no position on the network territorial rule.

a. Network Bargaining Power

Sinclair argues that the modification of the three core rules is not necessary for the health of the networks, but would severely hinder the autonomy of affiliates and frustrate the principle of localism that has traditionally played a large role in broadcast regulation. The core rules are not necessary to protect networks as they already have immense bargaining power that they readily exercise to: (1) demand affiliate commitments of up to ten years, (2) require that affiliates clear programming developed by their networks in previously non-network day-parts, and (3) impose large monetary penalties and/or loss of affiliation on their affiliates for their preemption of network programming. Sinclair asserts that the proposed modifications will only take broadcast regulation further away from the principle of localism.

Noting that the duty of serving the interests of the local community is solely that of the affiliate, Sinclair points out that a national network is unable, by definition, to fulfill the needs of the specific community of license. As Sinclair outlines, broadcast stations remain the primary outlet for video programming and unlike cable, DBS, and wireless cable, broadcast stations provide uniquely local programming. The three core network-affiliate rules protect local programming autonomy and their modification likely would harm local interests.

Sinclair describes the great leverage that networks have over their affiliates by virtue of the system of network affiliation. Networks can always take their affiliation to another station whereas local stations have a difficult time finding a new network with which to affiliate -- as evidenced by Sinclair's own loss of a Fox affiliation for its Milwaukee station, even though it is a group owner. As Sinclair notes, their experience "is an example not only of the fact that networks will terminate affiliations, but of the fact that group ownership of television stations does little to diminish that threat." See Comment of Sinclair Broadcast Group, Inc., at 10 (emphasis in original). Loss of network affiliation can be devastating and it is a threat that networks can and do hold over the heads of their affiliates.

b. The Network-Affiliate Rules

Sinclair asserts that, as to the right to reject rule, stations rarely preempt solely for financial reasons -- largely due to the persistent fear of losing affiliation with a network.